Reply Brief of Appellants

United States Court of Appeals

For the Ninth Circuit

No. 15293

CEDAR CREEK OIL AND GAS COMPANY, a corporation, INTERNATIONAL TRUST COMPANY, a corporation, H. C. SMITH, SUSAN M. WIGHT and W B. HANEY,

Appellants,

vs.

FIDELITY GAS COMPANY, a corporation, MONTANA-DAKOTA UTILITIES COMPANY, a corporation, and SHELL OIL COMPANY, a corporation,

Appellees

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Except for two propositions, appellants feel their original brief adequately meets all of the argument contained in the brief of the appellees.

In view of the extended argument and the citation of many cases on the question of laches, a further discussion of that subject seems warranted by way of reply. In addition, there is argument on the part of the appellees that the Fidelity Agreement is not a lease in opposition to the specific findings of the Court. This reply brief will be limited to a discussion of these two subject.

LACHES

We adopt as a correct statement of the law, the quotation appearing in appellees' brief at page 28 from *Potash Company of America v. International Min. & C. Corporation*, *213 Fed. (2d) 153, 154, 10th Circuit, 1954:*

> "To constitute laches, two elements must exist; first, inexcusable delay in instituting suit and second, prejudice resulting to the defendant from such delay."

In our opening brief, our emphasis was on the lack of the first of the two elements, that is, inexcusable delay in instituting suit. The letter which constituted the notice that appellees, or any of them, were claiming under the Fidelity Agreements was mailed on April 27, 1951. This suit was commenced against the appellees Fidelity Gas Company and Montana-Dakota Utilities Company on December 3, 1952. The amended complaint was filed on February 2, 1953. Thus, not more than 19 months elapsed from the receipt of the letter of April 27, 1951, by any of the ap-

pellants and the institution of this suit. We have examined each of the cases cited by appellees on the question of laches. They fall generally into two categories. One, cases in which minerals are involved, and two, cases in which the actions are ones to set aside contracts or to establish involuntary trusts. In both these categories, the doctrine of laches is applied most harshly. We feel the period considered in each of these cases might be illuminating to the Court to illustrate the standard applied in each case as to the required delay to sustain a finding of laches. All of these cases fall within the exception to the rule requiring the application of the applicable statute of limitations by way of analogy to measure the delay required to establish the first element of laches.

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Union Oil & Gas Company v. Cross, 220 Kentucky, 271, 295 S. W. 172	6 yrs. 6 mos.
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Dela Lamar Mines of Montana v. Mackay, 104 Fed.)2d) 271	19 mos.
Brown v. Privette, 109 Okla. 1, 234 Pac. 577	18 mos.
Davis v. Godwin Barkley Company, 120 Okla. 274, 521 Pac. 1042	18 mos.
Robert Hind Limited v. Silva, 75 Fed. (2d) 74, Where Statute of Limitations Are 2 Years	2 yrs. 6 mos.

In the case of Robert Hind Limited v. Silva, 75 Fed. (2d) 74, cited the applicable statute of limitations was two years, but the Court held that delay of two years six months was not sufficient to constitute laches.

Able counsel has undoubtedly combed the reports for the cases where the shortest period has been held to be sufficient to support a finding of laches. Under the great majority of these cases, the Court would be required to hold in this case there was no delay sufficient to fulfill the first requirement of the rule stated in the Potash case.

In the case of *Brown v. Privette,* the action was for rescission and oil was discovered during the delay on the very lands in litigation. The same is true of *Davis v. Godwin Barkley Company.* In all of the cases where the very short period was held to constitute laches, the action was one to set aside a lease or other agreement. Examination of the cases indicates that the doctrine is more frequently applied to short periods in that class of cases than in others, as indicated by the language in *Robert Hind Limited v. Silva, 75 Fed. (2d) 74* where this Court, considering a case where the suit was to cancel a release given for personal injuries, said:

> "It is fundamental that 'a right to rescind must be exercised promptly on discovery of the facts in which it arises, the requisite diligence being governed by the circumstances of the particular case'. 13 C. J. 615, 616."

but this Court held there was there no laches.

In *Buchler v. Black, supra,* the action was to set aside a fraudulent sale. The Court said:

> "The authorities that point to the necessity of the exercise of the right of rescinding or avoiding a contract or transaction, as soon as it may reasonably be done after the party with whom the right is optional is aware of the facts which give him that option are numerous and well collected in the brief of appellees' counsel."

This is not an action for rescission or to set aside the agreement as fraudulent. It does not fall within any of the cases cited by appellees where comparable delays have been held to be sufficient to constitute laches.

The time table of drilling shows no prejudice and no undue delay. The first drilling by Shell was in the Pine Unit, entirely outside the units included within the Fidelity Agreements. There is no connection between drilling in that unit and drilling in Units 1 through 8(b). The first drilling in any of the units within the Fidelity Agreement was commenced on March 3, 1952, (Def. Ex. 60) more than 10 months after the letter of April 27, 1951. That well, as has been pointed out, was more than 30 miles from the lands of appellants.

The second well on the unitized area was not started until October 9, 1952, (Ex. 60) which was two months before this suit was filed. This well was in the adjoining section south of the first well. Shell was moving away from appellants' lands, not toward them, when suit was filed.

This was all the drilling that had occurred on December 4th, when the original complaint was filed. An examination of the amended complaint and the record will show that a considerable amount of time would be required in searching titles and in the preparation of the complaint. The action was filed nine months after the first drilling of any land in the area covered by the Fidelity Agreement.

If any significance can be attached to the drilling of the five wells in the Pine Unit which had commenced at the time the case was begun, we point out that all five of the wells are within a radius of not to exceed one mile. After the discovery well the other wells were simply development wells. All of them are at least 25 miles from appellants' lands.

Compare these facts with any of the cases cited by appellees on the delay sufficient to constitute laches in suits involving oil lands, and it will be seen this case does not come even close to the facts in the cases cited. In every one of those cases the drilling had been on the lands involved, or at least in the immediate vicinity. Large sums had been spent on the lands themselves or on lands adjacent to them. In each case it was clear that the drilling would not have been performed if it were not for the silence of the land owner.

We call the Court's attention to its exhaustive discussion of the doctrine as it relates to the passage of time in *Gillons v. Shell Oil Company, supra,* where this Court in discussing laches quotes and cites from cases, characterize

the element of delay as: "Stale demands." "Neglect." "Staleness of the claim." "Antiquated demands." "Gross laches." "Slept upon his rights unreasonably long."

There are not here present facts taking this case out of the rule stated by this Court in *City of Roswell v. Mountain States Telephone & Telegraph Company, 78 Fed. (2d) 379* quoted in appellants' brief.

Once its agreement with Montana-Dakota Utilities was consumated, Shell was bound to perform no matter what appellants did or did not do. The drilling under way when this action was instituted was performance under that agreement.

It was performance to which Shell was pledged under its contract. It was required by the contract—it was not induced by anything appellants did or refrained from doing. Suppose appellants had started suit in 1951. Could Shell have altered its course? Could it have abrogated its contract? The questions answer themselves.

Shell could only be prejudiced if it had drilled appellants' lands or lands adjacent to them before the suit started. As pointed out above, on the date the action was filed there was no drilling on the anticline within 35 miles and new drilling both to the north and south was moving away from appellants' lands.

Compare the facts in *Union Oil & Gas Co. v. Cross, supra, Buchler v. Black, supra* and *Brown v. Privette, supra,* as typical of cases cited by appellees with the facts here. The

comparison shows the drilling in each case was on the lands in suit or on lands in close proximity to those involved.

Neither requirement of laches, undue delay nor prejudice within the requirements of *Potash Company of America v. International Min. & C. Corporation, supra,* here appears and the Court erred in holding appellants guilty of laches.

FIDELITY AGREEMENT A LEASE

Appellees' brief at page 62 contains the following statement:

> "The argument for the strict rule of forfeiture and interpretation is based on the false assumption that the Fidelity Operating Agreement is an oil and gas lease."

Then follows argument that the Fidelity Agreement is an operating agreement and not a lease. Reliance is had on *Cedar Creek Oil & Gas Co. v. Archer, 112 Mont. 477, 481, 483, 117 Pac. 265.* Earlier in the brief appellees cite *Bowes v. Republic Oil Company, 78 Mont. 134, 252 Pac. 800.* Appellees thus by their brief attack the findings of the Trial Court. Finding No. XIII, (Tr. 192) reads:

> "The agreements grant and sublease to defendant Fidelity Gas Company as operator, oil and gas working rights of plaintiffs in the lands hereinabove described, * * *."

Finding No. XIV is that the Fidelity Operating Agreements are options. The Court considered the effect of the Fi-

delity Agreements at length in the Memorandum. Among other things the Court says in its Memorandum:

> "This language used by the parties indicates their intention to make a sublease, and the court can find nothing in the other provisions of the agreement that require the court to defeat the intention of the parties so expressed by construing the instrument as something other than a sublease."

In the Memorandum the Court specifically rejects the argument now made in the appellees' brief that the Fidelity Agreements are not leases or subleases, and the Court concludes:

> "It seems clear to the court that the Fidelity Agreements here involved are subleases and must be considered as such * * *. If the Fidelity Agreements were merely operating agreements or drilling contracts, defendants contend Fidelity would have no interest to sublease to Shell." (Tr. 166, 167).

Appellees have not cross-appealed. What the appellees seek to do by this argument is prohibited under *Standard Accident Insurance Company v. Roberts, CCA 8, 1942, 132 Fed. (2d) 794.* They are seeking:

> ". . . to change or to add to the relief accorded by the judgment which was in their favor. They can raise here such issues only by a cross-appeal."

Since the Trial Court found the Agreements to be subleases, the rules applicable to the construction of oil and gas leases applies, and forfeiture thereof is favored and in the absence of a cross-appeal, appellees are bound by the finding of the Trial Court.

Why appellees cite the Bowes case is hard to comprehend. The Trial Court found by Finding No. XIV that the sublease was in the nature of an option. That finding puts it in exactly the same class as the lease considered in the Bowes case, and as in the Bowes case if the option were not exercised within the time contemplated, the lease died. If the Bowes' lease was dead, as appellees admit at page 43, then this lease was dead upon the failure of appellees to exercise the option contained in Paragraph 4, and as held in the Bowes case, the provision rendering it dead is ". . . self operative." As was said in the Bowes case, this operating agreement, within the finding of the Court, falls ". . . within the category of the 'unless' form of lease which terminates ipso facto on failure to exercise the option granted, and under which no affirmative action is required of the lessor."

Since the filing of the appellants' brief, the Supreme Court of the State of Montana has handed down its opinion in the case of *Schumacher v. Cole, 14 State Reporter 123, ..., Pac. (2d)* .... The Court restated its adherence to the rule in *McDaniel v. Hager-Stevenson Oil Company, 75 Mont. 356, 366, 243 Pac. 582; Thomas v. Standard Development Company, 70 Mont. 156, 224 Pac. 870; McNamara Realty Company v. Sunburst Oil and Gas Company, 76 Mont. 332, 352, 240 Pac. 166; Abell v. Bishop, 86 Mont. 478, 497, 284 Pac. 525; Williard v. Campbell, 91 Mont. 493, 504, 11 Pac. 782 and Bowes v. Republic Oil Company, 78 Mont. 134, 143, 252 Pac. 800.*

The Court having found the Fidelity Agreement to be a sublease, the rules as to the construction of oil and gas leases apply. Forfeiture is favored, and all doubts must be resolved against the lessee.

The judgment of the Trial Court should be reversed with directions to enter judgment for the appellants quieting the titles of the appellees to their lands and leases insofar as they relate to the deep sands.

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